

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LIMA et al.,

Defendants and Appellants.

D035050

(Super. Ct. No. SCD143063)

APPEAL from judgments of the Superior Court of San Diego County, William H. Kennedy, Judge. Affirmed in part, reversed in part and remanded.

James Lima and Hieu Huu Le were involved in a residential robbery that resulted in a high-speed car chase with police officers; while pursuing the two men through a red traffic light, one of the police cars struck and killed an innocent motorist. The district attorney charged Lima and Le with a number of criminal counts arising out of the incident, including one count of murder. A jury convicted both men of, inter alia, first degree murder and evading an officer causing injury or death.

Le appeals, contending that (1) neither of the murder theories on which the jury was instructed (the provocative act theory and the felony-murder rule) applies to the circumstances of this case and thus that his murder conviction must be reversed and dismissed; and (2) the evidence is insufficient to establish that he aided and abetted the evasion of the police.

Lima also appeals, challenging his murder conviction on the grounds that (1) there was insufficient evidence to support his liability for murder on a provocative act theory; (2) the felony-murder theory does not apply and should not have been presented to the jury; (3) the court improperly denied him the right to conduct discovery and to introduce evidence relating to the officer's conduct as a proximate cause of the motorist's death; and (4) the prosecutor's special instruction regarding the effect of the officer's conduct erroneously informed the jury regarding applicable principles of proximate cause. Finally, he argues that the court erred in denying his posttrial motion to represent himself in accordance with *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) and thus the matter must be reversed and remanded for resentencing.

The Attorney General concedes that the felony-murder rule does not apply to the facts of this case and we conclude that it was error for the court to give the jury instructions supporting that theory of liability. On that basis, we reverse both defendants' murder convictions. We also conclude that the trial court erred in giving the prosecution's special instruction regarding principles of proximate cause relating to the murder charge. However, we reject the defendants' remaining contentions of error and affirm the convictions on all other counts.

## FACTUAL AND PROCEDURAL BACKGROUND

On a weekday afternoon in February 1999, Lima used a gun to force his way into John Vo's home. After entering the home, Lima bound the hands and feet of Vo's mother-in-law and took a gold and diamond bracelet from her arm.

At about the same time, Le entered the house through a sliding glass door at the back of the home. After foraging through a drawer in the living room, Le went upstairs and found Vo's sister-in-law, Chi Ho, in an upstairs bedroom. He tied her hands together with a phone cord and left to ransack another bedroom. Ho was able to loosen the phone cord and used a cell phone to call 911 and a relative.

After making the calls, Ho went downstairs. Lima instructed Ho to sit down, began to touch her breasts through her sweatshirt and attempted to take off her pants. Ho backed away, crying, and Lima did not follow her. Le came downstairs and said "Go" in Vietnamese. The men left through the front door, saying they would come back in a minute.

In the meantime, San Diego Police Officer Daniel Burow arrived at Vo's home and saw a Ford Bronco, with no license plates, parked in front. Officer Burow could not see through the tinted windows of the Bronco and took cover behind a nearby tree while he waited for other officers to arrive. Less than a minute later, Lima and Le ran out of the house. Lima climbed quickly into the driver's seat of the Bronco. Le, who was carrying a bag, paused momentarily and made eye contact with Officer Burow before climbing into the passenger seat of the car.

Lima drove away and Officer Burow jumped into his police cruiser, turned on the lights and siren and followed the Bronco. Lima drove across some traffic pylons and

made an illegal U-turn; as he did so, Le reached out of the passenger side window and threw a nine-millimeter pistol into some bushes. At about this time, Officer Michael Moller joined in the chase, behind Officer Burow.

The Bronco was heading south as it approached an intersection with a four-way stop. Anticipating the Bronco's arrival, Officer Dewayne Glazewski had parked his patrol car, with lights flashing, across the northbound traffic lanes. However, the Bronco "blew" through the stop sign without stopping, passed Glazewski's patrol car, and turned into a residential area, driving at 30 to 35 miles per hour and ignoring a red light. Lima passed a truck that was stopped at a stop sign by driving into the oncoming traffic lane and made a "blind" turn at the intersection without stopping. Shortly thereafter, he came to a four-way intersection that had traffic in all directions. He moved into the oncoming traffic lane to pass a waiting car, turned right in front of that car and continued to drive, at speeds of 50 to 60 miles per hour, through several red lights.

With the police still in pursuit, the Bronco became stuck in traffic at an intersection stop light near a shopping mall. After Officer Burow pulled up behind the Bronco, Lima drove up onto the sidewalk, passing cars on the right; as he did so, the Bronco knocked a side rearview mirror from a truck waiting at the light. Lima narrowly missed the signal post and made a right turn into the intersection against the red light. There was significant crosstraffic already in the intersection and two cars had to swerve or abruptly apply their brakes to avoid hitting the Bronco.

A driver who had started to pull her car out into the street from a nearby driveway saw the Bronco run the red light and quickly put her car into reverse to avoid being hit.

At that time, Lima was driving well over the speed limit, perhaps as fast as 65 miles per hour, and honking the car horn "over and over." He sped through a red light at another intersection with heavy traffic and almost collided with a small white pickup truck. Following closely behind the Bronco, Officer Burow's patrol car broadsided another car that was crossing through the intersection, killing its driver, June Meng.

Officer Glazewski continued to pursue the Bronco, which sped through another stop sign and drove into a residential area, where Lima parked it. Lima and Le got out of the Bronco, and Officer Glazewski attempted to chase Le but lost sight of him. After a search involving a police dog, officers found Le hiding in a bush. They recovered cash from Le, cash and jewelry stolen from Vo's home from a jacket found on the ground near the Bronco, and a bag with more jewelry in the Bronco.

Meanwhile, Lima avoided detection by the officers and approached motorist Casey Stoute, who earlier had seen the Bronco being chased and pulled over to see what was happening. As Lima ran toward him, Stoute called 911 and drove his car slowly as he talked to the dispatch operator. Lima followed, screaming "[t]hey're looking for me. Gimme a ride and I'll pay you." After some police drove by without stopping, Stoute stopped his car. He insisted that Lima pat himself down and then agreed to give Lima a ride. Stoute pretended that he was talking to his girlfriend as he continued to talk to the dispatch operator while driving Lima around. During the drive, Lima told Stoute that police were looking for him in connection with a robbery. A half-hour later, Stoute flagged down a passing police car, which stopped him and arrested Lima. As the police approached the car, Lima threw a gold and diamond bracelet into Stoute's lap.

The district attorney filed an amended information charging Lima and Le with one count each of murder, conspiracy to commit robbery and felonious evasion of a police officer, and two counts each of residential robbery and kidnapping for extortion. At trial, defense counsel admitted that the defendants were guilty of the robberies

The jury deliberated for 3 hours and 45 minutes before convicting Lima and Le of first degree murder, conspiracy to commit robbery, residential robbery (two counts), false imprisonment by menace (two counts) and felonious evasion of a police officer. It also convicted Lima of sexual battery. The court sentenced Lima to 45 years to life and Le to 33 years 4 months to life.

## DISCUSSION

### *Murder*

#### 1. *Provocative Act Murder*

When a defendant or his accomplice commits a provocative act and his victim or a police officer kills an innocent third party in reasonable response to that act, the defendant is guilty of murder even though he did not act with malice aforethought. (*People v. Gilbert* (1965) 63 Cal.2d 690, 704-705.) A "provocative act" is an act that is deliberately performed with conscious disregard for human life and that has natural consequences dangerous to human life. (CALJIC No. 8.12; *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 583, overruled on other grounds by *People v. Antick* (1975) 15 Cal.3d 79, 92, fn. 12.)

A. Applicability of the Provocative Act Theory

Le argues that the provocative act theory is inapplicable to this case on two grounds. First, he contends that provocative act principles apply only where the victim or police officer kills a perpetrator or accomplice to the crime, not an innocent bystander. However, this argument is unsupported in the law. (CALJIC No. 8.12; see *Pizano v. Superior Court* (1978) 21 Cal.3d 128; *People v. Gallegos* (1997) 54 Cal.App.4th 453.)

Second, Le asserts that the provocative act theory does not apply to him because Meng's death was not in furtherance of the robberies. However, this argument fails to distinguish between provocative act principles, which govern criminal liability for a killing committed by an innocent third party, and principles of vicarious liability, which govern criminal liability for a killing committed by an accomplice or coconspirator.

The provocative act theory does not require that the killing be *in furtherance of* the underlying criminal enterprise, but rather that it *results from* a response to a provocative act. (See CALJIC No. 8.12; *People v. Gilbert, supra*, 63 Cal.2d at pp. 704-705.) By contrast, vicarious liability principles require that the killing be in furtherance, or a natural and probable consequence, of the underlying criminal enterprise. (CALJIC No. 6.11; *People v. Gilbert, supra*, at p. 705.) Thus, if Lima had crashed into Meng's car, the prosecution would have had to show that the killing was in furtherance, or a natural and probable consequence, of the underlying criminal enterprise for Le to be convicted of murder. However, pursuant to the provocative act theory of murder, one is criminally liable for a killing that results from a reasonable response to a provocative act committed by him *or his accomplice*, without regard to whether the killing was in furtherance of the

criminal enterprise. (See *People v. Gilbert*, *supra*, at pp. 704-705; *People v. White* (1995) 35 Cal.App.4th 758, 765 [question is whether the provocative act was in furtherance of the criminal enterprise].) Le's argument is thus unavailing.

B. Sufficiency of the Evidence to Support Provocative Act Murder

As noted above, one of the elements of provocative act murder is that the defendant act with conscious disregard for human life. (*People v. Gilbert*, *supra*, 63 Cal.2d at pp. 704-705.) Lima contends that there was insufficient evidence to establish that his conduct in evading arrest showed a conscious disregard for human life. We disagree.

An act that is "'fraught with grave and inherent danger to human life'" is sufficient to establish conscious disregard in support of a provocative act theory of murder. (*Taylor v. Superior Court*, *supra*, 3 Cal.3d at p. 584, citing with approval *People v. Reed* (1969) 270 Cal.App.2d 37 [pointing a weapon at police officers] and *Brooks v. Superior Court* (1966) 239 Cal.App.2d 538 [reaching for and grasping an officer's shotgun]; *People v. Garcia* (1999) 69 Cal.App.4th 1324 [firing a gun into the ceiling of an occupied room].) Further, it has long been recognized that engaging in a high-speed chase with police officers through intersections against traffic signals or without obeying stop signs is "'highly dangerous'" conduct (*People v. Fuller* (1978) 86 Cal.App.3d 618, 628, quoting *People v. Pulley* (1964) 225 Cal.App.2d 366, 373) and that proof of such conduct is sufficient to support a finding of conscious disregard. (See *People v. Satchell* (1971) 6 Cal.3d 28, 33-34, fn. 11, overruled on other grounds by *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12 [conduct sufficient to permit the jury to find implied malice second degree murder].)



Here, the evidence shows that while being chased by several police cars, Lima drove at excessive speeds and through intersections without regard to traffic signals. He continued to drive in this fashion even after he encountered substantial traffic around a shopping mall, sideswiped one vehicle and nearly collided with several others, with full awareness that the police were pursuing him. This evidence was more than sufficient to support a reasonable jury's conclusion that Lima acted with conscious disregard for human life. (*People v. Satchell, supra*, 6 Cal.3d at pp. 33-34, fn. 11.)

## 2. *Felony-Murder Theory*

Pursuant to the felony-murder rule, a homicide "committed in the perpetration of" certain felonies is murder even though the person who commits the killing lacks malice aforethought. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080, italics omitted; *People v. Hansen* (1994) 9 Cal.4th 300, 308.) Where the killing occurs during the perpetration of, or an attempt to perpetrate, a statutorily specified felony, it is of the first degree (Pen. Code, § 189); if it occurs during the perpetration or an attempt to perpetrate a felony "inherently dangerous to human life," it is murder of the second degree. (*People v. Hansen, supra*, 9 Cal.4th at pp. 308-309.) The felony-murder doctrine applies only to a killing that is committed by the felon or his accomplice. (*People v. Kainzrants, supra*, 45 Cal.App.4th at p. 1080.) Because neither Lima nor Le killed Meng, the felony-murder doctrine does not apply here, a point the Attorney General concedes.

Despite this, the court instructed the jury regarding first degree felony murder, as follows: "The unlawful killing of a human being . . . which occurs during the commission or attempted commission of a robbery or as a direct causal result of the robbery is murder . . .

when the perpetrator had the specific intent to commit robbery." Although it did not give the standard instruction relating to second degree felony murder (CALJIC No. 8.32), the court also informed the jury that "every person who unlawfully kills a human being . . . during the commission . . . of a felony inherently dangerous to human life is guilty of the crime of murder," and that "[e]vading a police officer while driving recklessly is a felony inherently dangerous to human life."

The Attorney General asserts that the court's error in instructing the jury regarding a felony-murder theory of murder does not require reversal because there is no reasonable likelihood that the jury was misled regarding the applicability of the felony-murder doctrine. However, in so arguing, he misstates the applicable standard for determining whether the error was reversible. Where the prosecution presents its case, and the jury is instructed, on alternate theories of criminal liability, some of which are legally correct and others of which are not, the applicable standard requires reversal of the conviction unless the record reveals that the verdict rested on a proper theory. (*People v. Green* (1980) 27 Cal.3d 1, 69; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1238.)

The Attorney General suggests that "there is no basis for believing the jury would have interpreted the court's instructions . . . as creating a theory of liability separate and distinct from provocative act murder." He relies on the fact that, in instructing the jurors regarding provocative act murder, the court told them:

"In order, then, to find the defendant James Lima guilty of the crime of murder, each of the following elements must be proved: [¶]

1. The crime of robbery was committed by James Lima; [¶]

2. During the commission of the robbery, James Lima also committed an intentional provocative act; [¶] 3. A peace officer, in response to the provocative act, killed another person; [¶] 4. The defendant, James Lima's commission of the intentional provocative act was a cause of the death of June Meng. [¶] A homicide is murder of the first degree when it occurs during the commission or attempt to commit the crime of robbery and the perpetrators have the specific intent to commit robbery."

(The court gave a similar instruction relating to Le's culpability, as an accomplice, for Lima's provocative act.) Based on these instructions, the Attorney General argues that the jury could have only construed the felony-murder instructions as applying in tandem with (i.e., in addition to), rather than separate from, the provocative act murder instructions. Accordingly, he contends that the giving of the felony-murder instructions increased the prosecution's burden at trial and was thus detrimental to the prosecution rather than the defense.

We agree with the Attorney General's general observation that the instructions given to the jury in support of the murder charge were confusing. However, we cannot agree that the instruction he relies on, or any other aspect of the record, establishes that the jury's verdict of guilt on the murder charge was based on a provocative act theory, somehow enhanced with felony-murder findings.

The court specifically instructed the jury that it could find the defendants guilty of murder for an "unlawful killing of a human being . . . which occurs during the commission or attempted commission of a robbery or as a direct causal result of the robbery . . . when the perpetrator had the specific intent to commit robbery." Nothing in the instructions indicated that the unlawful killing had to be committed by the perpetrator or his accomplice for the felony-murder doctrine to apply. Thus, the jury was never given any reason to

believe that it could not convict Lima and Le of first degree murder for any killing that occurred during the commission of the robbery. Further, the court's repeated instructions to the jury that "[t]he unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of a robbery or as a direct causal result of the robbery is murder of the first degree when the perpetrator had the specific intent to commit robbery[.]" although proper on the issue of whether the murder was of the first degree, might have been construed by the jury as further support for the notion that Lima and Le could be convicted of murder on a felony-murder theory.

In addition to giving express instructions on a first degree felony-murder theory, the court also instructed the jury that reckless evasion was an inherently dangerous felony, a concept that the prosecutor reiterated in her closing argument. However, that reckless evasion is an inherently dangerous felony is irrelevant except as support for a second degree felony-murder theory. The jury may have reasonably concluded, from the instruction and argument regarding reckless evasion, that the felony-murder doctrine was applicable independent of provocative act principles and that it could convict the defendants of first degree murder because Meng's death occurred as a result of the defendants' flight from the scene of the robbery, regardless of whether the flight was a provocative act.

The possibility that the jury may have relied on the felony-murder theory is further supported by an erroneous instruction regarding Le's guilt, as an aider and abettor, for the murder charge. Before instructing on the elements of the charged offenses, the court gave instructions relating to general principles of aider and abettor liability and then told the jury:

"[I]f you feel that it's applicable in this case, in order *to find the defendant Le guilty of the crime of murder* as charged in Count 1, you must be satisfied beyond a reasonable doubt that: 1. The crimes of robbery were committed[;] 2. [D]efendant Le aided and abetted those crimes[;] 3. [A] co-principal in [those crimes] committed the crime of felony evading a peace officer causing death or felony evading a police officer; 4. The crime[] of felony evading a peace officer causing death or felony evading a peace officer [was] a natural and probable consequence of the commission of the robberies." (Italics added.)

In addition to misapplying aider and abettor liability principles (see CALJIC No. 3.02), this instruction told the jury that it could convict Le of murder if it found that he participated in the robberies and felony evasion was a natural and probable consequence of the robberies, *irrespective of whether the evasion was a provocative act*. This instruction thus exacerbated the problem created by the giving of the felony-murder instructions in the first instance.

The court instructed the jury on a theory of criminal liability that could not, as a matter of law, support a murder conviction against these defendants. Although the prosecutor's closing argument focused primarily on a provocative act theory of liability and Le's counsel stated at one point that a provocative act was required, this does not eliminate the possibility that the jury may have concluded from the instructions as a whole that they could convict the defendants of murder based on felony-murder principles. The relatively brief period of deliberation, particularly given that there were multiple defendants and numerous charges, certainly does not provide any basis for confidence that the jury did not do just that.

We cannot discern from the record that the jury's verdict of guilt was based on a provocative act theory rather than a felony-murder theory and accordingly we must reverse the defendants' convictions for first degree murder. (*People v. Green, supra*, 27 Cal.3d at p. 69.) Although we reverse the murder conviction on this ground, for purposes of retrial, we proceed to address the defendants' arguments challenging the court's rulings on discovery and evidence relating to proximate cause and their contention that the prosecutor's special instruction improperly removed the proximate causation element of the murder charge from the jury's consideration. (See *People v. Hill* (1998) 17 Cal.4th 800, 848, citing *People v. Memro* (1985) 38 Cal.3d 658, 690.)

### 3. *Proximate Cause Principles*

For a defendant to be held criminally liable for a killing resulting from an injury inflicted by a third party, his acts must have been a "proximate cause" of the death of the victim. (*People v. Gardner* (1995) 37 Cal.App.4th 473, 479.) In a homicide case, an act that "sets in motion a chain of events that produces, as a direct, natural and probable consequence of the act or omission[,] the [death] and without which the [death] would not occur" is a proximate cause of the death. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 48, internal quotations omitted, quoting CALJIC No. 3.40; also *People v. Roberts* (1992) 2 Cal.4th 271, 319-321 [proximate cause principles require that the harm is a natural and probable consequence of the defendant's act].)

A defendant may be criminally liable for an injury proximately caused by his act even if there is another cause that contributed to the injury. (*People v. Hansen* (1997) 59 Cal.App.4th 473, 479.) If an intervening cause is a normal and reasonably foreseeable

result of the defendant's act, it will not relieve defendant of criminal liability. (*Ibid.*) Only an "unforeseeable intervening cause, an extraordinary and abnormal occurrence" will exonerate the defendant. (*People v. Armitage* (1987) 194 Cal.App.3d 405, 420.) A consequence is reasonably foreseeable even though it may not have been a strong probability; that it might reasonably have been contemplated is enough. (*People v. Schmies, supra*, 44 Cal.App.4th at p. 50.) Further, it is not the precise consequence, but instead the possibility of some harm of the kind that might result from the defendant's act, that must be foreseeable. (*Ibid.*)

A. Denial of Discovery Motions and Exclusion of Evidence

Prior to trial, the court denied Lima's motion to compel discovery of the San Diego Police Department's policies concerning vehicular pursuits and his *Pitchess* motion seeking review of, inter alia, documents reflecting disciplinary findings made against Officer Burow arising from the fatal accident. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.) During trial, the court also refused, on relevance grounds, to allow Lima to ask Officer Burow about police department practices and policies, whether he was trained on those matters and whether he was disciplined as a result of the accident. The court also sustained a relevancy objection when defense counsel asked Officer Glazewski whether Burow slowed before entering the intersection where the accident occurred. Lima contends that he was unconstitutionally deprived of his right to present a defense as a result of these rulings.

A trial court's rulings on discovery and the admissibility of evidence are generally subject to review under an abuse of discretion standard. (*Alford v. Superior Court* (2001)

89 Cal.App.4th 356, 367 [discovery generally]; *Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535 [discovery of police personnel records]; *People v. Hall* (1986) 41 Cal.3d 826, 834-835 [admission of evidence].)

i. Police Department Policies and Practices

In the proceedings below, Lima conceded that discovery of the police policies was not necessary as to issue of causation, but instead was relevant as to the issue of whether the defendants acted with implied malice, or complete disregard to human life, and for general impeachment of Officer Burow. Having informed the trial court that he was not seeking discovery of the police policies and practices on the issue of causation, Lima cannot now be heard to complain that the court erred in not admitting it on that basis.

Insofar as the court denied discovery of the materials or admission of evidence as irrelevant to implied malice, we find no abuse of discretion. In the absence of any evidence that at the time of the high-speed chase the defendants were aware of the Department's policies and practices regarding vehicular pursuits, evidence of those policies and practices has no bearing on whether they acted deliberately, with conscious disregard for human life.

Similarly, we find that the court did not err in precluding evidence at trial of police department practices and policies and whether Officer Burow was given training on those practices and policies, over Lima's argument that the evidence was necessary for impeachment purposes. Because there was no evidence at trial regarding such matters, the excluded evidence would not have impeached anything.



The trial court reasonably concluded that the proposed evidence was not relevant and that the discovery was neither relevant nor likely to reveal information bearing an implied malice. It did not err in doing so.

ii. Disciplinary Records

Lima made a pretrial request for an in camera review of documents reflecting any disciplinary findings against Officer Burow as a result of the accident, seeking to discover any information in those documents that contradicted Officer Burow's preliminary hearing testimony that he was driving safely at the time of the accident. At trial, he also sought to ask Officer Glazewski whether Officer Burow slowed down before entering into the intersection. On appeal, he argues more generally that the requested documents and proposed evidence bears on the reasonableness of Officer Burow's conduct and thus be relevant to whether the harm was a reasonably foreseeable consequence of his conduct. We find no abuse of discretion or violation of the defendants' constitutional rights resulting from the denial of the *Pitchess* motion or the exclusion of evidence.

In a case such as this one, the question of foreseeability does not focus on whether the harm was reasonably foreseeable as a result of the officer's conduct, but instead on whether the harm was reasonably foreseeable to the defendant as a consequence of his own conduct. (*People v. Schmies, supra*, 44 Cal.App.4th at pp. 51-52.) "Since the officers' conduct was a direct and specific response to [the] defendant's conduct, the claim that their conduct was a superseding cause of the accident can be supported only through a showing that their conduct was so unusual, abnormal, or extraordinary that it could not have been foreseen." (*Id.* at p. 52.)

Applying these principles, whether Officer Burow was subjected to discipline by the Department as a result of his involvement in the fatal accident has very little, if any, bearing on whether it was reasonably foreseeable to Lima that his evasion of the police would result in a fatal accident. Similarly, whether Officer Burow slowed down before entering into the intersection, although relevant to the reasonableness of his conduct from his perspective, was not relevant to the issue at trial, which was whether it was foreseeable to Lima that an accident might occur as a result of his acts in fleeing from the police. The trial court did not abuse its discretion in denying Lima's *Pitchess* motion or sustaining objections to questions posed to Officer Glazewski.

B. Special Instruction No. 2

Lima contends that the court erred in giving the prosecution's special instruction No. 2 that

"[a]ny negligence or fault of the officers is not a defense to the charge against the defendants. The fact that the officers may have shared responsibility or fault for the accident does nothing to exonerate the defendant for his role. Whether the officer's conduct could be described with such labels as negligent, careless, tortious, cause for discipline, or even criminal, in an action against them, is not at issue with respect to the defendants here."

This special instruction quotes, almost verbatim, language set forth in *People v. Schmies*, *supra*, 44 Cal.App.4th at page 51. Lima contends that this language erroneously suggested to the jury that it should not consider the effect of the officers' behavior in determining causation. We agree that the italicized language has precisely that effect and was thus given in error.

The jury was appropriately instructed that "[a] cause of death is an act that sets in motion a chain of events that produces death as a direct, natural and probable consequence of the act and without which the death would not occur" (CALJIC No. 3.40; *People v. Hansen, supra*, 59 Cal.App.4th at p. 479), and that if the conduct of two or more persons contributes to the death, the conduct of each such person is a cause of death if it was a substantial factor contributing to the result. (CALJIC No. 3.41.) Although negligence on the part of the victim or a third party responding to the defendant's unlawful act is generally not a defense to the defendant's criminal liability (*People v. Roberts, supra*, 2 Cal.4th at p. 312; *People v. Harris* (1975) 52 Cal.App.3d 419, 426), such negligence will constitute a superseding cause of the death, and thus relieve a defendant of criminal liability, if it was so extraordinary as to be unforeseeable. (*People v. Roberts, supra*, 2 Cal.4th at pp. 321-322.)

Here, the jury was not specifically instructed regarding the effect of unforeseeable third party conduct on the defendants' liability for Meng's death (compare *People v. Schmies, supra*, 44 Cal.App.4th at p. 50, fn. 7), and the italicized language of the prosecution's special instruction essentially informed the jury that the officers' conduct was irrelevant in determining causation — a point the prosecutor reiterated in closing argument. The instruction did not comport with the law and the court thus erred in giving it. (*People v. Roberts, supra*, 2 Cal.4th at pp. 321-322.) However, because we are reversing the murder convictions on other grounds, we need not determine whether the error requires reversal.

## *Felonious Evasion Conviction*

### 1. *Sufficiency of the Evidence*

Le challenges the sufficiency of the evidence to support his conviction for felonious evasion of the police resulting in death or serious bodily injury. Because he was not the driver of the Bronco, Le's liability for evasion was based on an aider and abettor theory. "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Hill*, *supra*, 17 Cal.4th at p. 851, quoting *People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) Le contends that there is no evidence in the record that he did anything to aid or encourage Lima's driving. (The jury also made a specific finding that, in furtherance of the conspiracy, Le and Lima fled the house and led the police on the vehicular pursuit, resulting in Meng's death. Le does not challenge the sufficiency of the evidence to support this finding.)

An aider and abettor is guilty not only of the crime the principal intends to commit, but also of any other offense that was a "natural and probable consequence" of the crime aided and abetted. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117; see also *People v. Morante* (1999) 20 Cal.4th 403, 417 [conspirator's liability for a coconspirator's act that is a probable and natural consequence of the common design].) The jury was so instructed, and the prosecutor argued that Le was guilty of evasion as a natural and probable consequence of the robberies in which he participated as a coconspirator.

At trial, the evidence, or reasonable inferences to be drawn therefrom, showed that the defendants drove to the Vo's home in the Bronco, from which they had removed the license plates. It was undisputed that the men conspired to commit and carried out the robberies, and the evidence showed that upon completing the robberies, Le got into the Bronco with Lima after he saw Officer Burow standing near the patrol car. This evidence was amply sufficient to support the jury's finding that Le was involved as a coconspirator in the robberies and that the defendants' evasion of the police was a natural and probable consequence of the robberies.

*Denial of Lima's Faretta Motion*

Shortly before the sentencing hearing, Lima's counsel informed the court that, over his objection, Lima wanted to represent himself for the remainder of the posttrial proceedings. The court treated Lima's request as two motions, one for new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, and one to represent himself pursuant to *Faretta, supra*, 422 U.S. 806. The court denied the *Marsden* motion on the ground that Lima had not shown that his trial counsel was ineffective, indicating that in fact counsel did "an excellent to outstanding job" in representing Lima.

The court also denied the *Faretta* motion. In doing so, the court indicated that, based on the lateness of Lima's request and particularly since the posttrial motions and statement in mitigation had already been filed, "I'm at a loss to understand what remains [as] the purpose of self-representation except what was revealed during the *Marsden* phase of the hearing, in which the defendant says, well, he'd like a right to go through the transcript, which is presently unavailable, and comb the record to see if there [are] other

motions that he should bring." The court observed that this is exactly what an appellate attorney would be doing on Lima's behalf in connection with his appeal (which was already noticed) and concluded that the request was a "vehicle for delay and a facade." At the sentencing hearing, Lima renewed his *Faretta* motion, which the court again denied.

Where a defendant makes a *Faretta* motion during or after the trial, it is within the trial court's discretion to grant or deny the motion. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048.) In exercising this discretion, the trial court is to consider such factors as the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for his request, the length and stage of the proceedings and the disruption or delay that might reasonably be expected to result from the granting of the motion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.)

Lima contends that the trial court abused its discretion in denying his *Faretta* motion because it concluded that there were no further proceedings and failed to consider the factors set forth above. However, he misconstrues the trial court's comments. The court did not indicate that there were no proceedings in which Lima could represent himself, but instead concluded from the circumstances that the real purpose of the motion was delay. In reaching this conclusion, the court considered the following facts: (1) that sentencing motions and a statement in mitigation had been filed on Lima's behalf; (2) that the stated reason for the request was to permit Lima to review the reporter's trial transcript, which was not yet prepared, to see if additional motions should be brought; and (3) that Lima had already noticed an appeal of the judgment and it would be appellate counsel's job to see whether defense counsel had failed to take any appropriate action, including the bringing of

posttrial motions. The court also specifically found that defense counsel had effectively represented Lima.

It is thus clear that, in exercising its discretion, the court expressly considered each of the identified factors, other than Lima's proclivity to substitute counsel, which was not specifically raised at the hearing. We do not conclude from the record that the trial court abused its discretion in its consideration of or ruling on Lima's *Faretta* motion.

#### DISPOSITION

The judgments are reversed as to the first degree murder convictions and are otherwise affirmed. The matters are remanded for further proceedings.

---

McINTYRE, J.

WE CONCUR:

---

NARES, Acting P. J.

---

HALLER, J.